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Issue Date: 15 January 2004

CASE NO.'s 2002-LHC-02330, 2002-LHC02331, 2002-LHC-02332

OWCP NO.'s 15-41670, 15-45229, 15-43792

In the Matter of:

LINTON DE LA CRUZ,
Claimant,

vs.

BAY HARBOR COMPANY and
WAUSAU INSURANCE CO,
Employer and Carrier,

and

BAY HARBOR COMPANY and
HAWAII EMPLOYERS' MUTUAL INSURANCE CO.,
Employer and Carrier,

and

CB TECH SERVICES, INC. and
HAWAII INSURANCE GUARANTY ASSN.,
Employer and Carrier.

Appearances:

Steven M. Birnbaum, Esq.
For Claimant

Robert C. Kessner, Esq.
For Bay Harbor Co. and Wausau Insurance Co.

Scott G. Leong, Esq.
For CB Tech Services and Hawaii Insurance Guaranty Assn.

Scott R. Devenney, Esq.
For Bay Harbor Co. and Hawaii Employers' Mutual Insurance Co.

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Linton De La Cruz ("Claimant") brings this claim under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter "the Act" or "the Longshore Act"), 33 U.S.C. § 901 *et seq*. against Bay Harbor Company/ Wausau Insurance ("BW"), Bay Harbor Company/Hawaii Employers' Mutual Insurance Company ("BH"), and CB Tech/Hawaii Insurance Guaranty Association ("CB Tech"). A formal hearing was held in Honolulu, Hawaii on March 11, 2003, at which all parties were represented by counsel and the following exhibits were admitted into evidence: Administrative Law Judge's Exhibits ("ALJX") 1-4, Claimant's Exhibits ("CX") 1-8, BW's Exhibits 1-29, BH's Exhibits 1-40, and CB Tech's Exhibits ("CBX") A-BB. Because the original exhibits of BW and BH are duplicative, they are hereby excluded from the record and the consolidated exhibits of BH and BW ("BHX") 1-45 are admitted in their place.

The Director submitted a statement of position on January 28, 2003, hereby admitted as ALJX-5. On June 4, 2003, the parties submitted their post-trial briefs. These are hereby admitted as ALJX 6-9.[1] The Director submitted a post-hearing statement of position on July 11, 2003, hereby admitted as ALJX-10. BW, BH, and CB Tech submitted a proposed stipulation for Claimant's average weekly wage at Terminix on March 17, 2003, hereby admitted as ALJX-11. On April 4, 2003, Claimant submitted his response to the employers' stipulation regarding average weekly wage at Terminix. Claimant's response is hereby admitted as ALJX-12.

Stipulations:

The parties agreed to the following stipulations:

1. Claimant's average weekly wage at the time of the April 9, 1997 injury was $578.91.

2. Claimant's average weekly wage at the time of the alleged April 21, 1999 injury was $725.00.

3. Claimant's average weekly wage while at Terminix was $701.89.[2]

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[1] ALJX-6 is Claimant's post-hearing brief, ALJX-7 is BW's, ALJX-8 is BH's, and ALJX-9 is CB Tech's.

[2] Although Claimant's average weekly wage was originally raised as an issue to be determined, BW, BH, and CB Tech agreed to this calculation by stipulation dated March 17, 2003, and Claimant raised no objection to the calculation. ALJX-11.

4. Claimant has not reached maximum medical improvement following his June 24, 2002 collapse.

5. Claimant reached maximum medical improvement on August 14, 1999 and on March 13, 2001.

I accept stipulations one through four as they are supported by substantial evidence of record. *See Phelps v. Newport News Shipbuilding & Dry Dock Co.,* 16 BRBS 325, 327 (1984); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142, 144 fn. 2 (1985). However, I am compelled to reject stipulation five. The date of maximum medical improvement is a question of fact based on medical evidence. *Trask v. Lockheed Shipbuilding,* 17 BRBS 56, 60. There is no medical evidence in the record to support the stipulation that Claimant reached MMI either on August 14, 1999 or on March 13, 2001. Therefore, stipulation five is not based on substantial evidence and is rejected.

Issues in Dispute:[3]

1. Do the time limits of Section 13 or Section 22 apply if BW is found liable for the April 21, 1999 injury and/or the cumulative trauma injury sustained from January 17, 2000 through April 14, 2000;

2. What is the extent of Claimant's disability after April 14, 2000 and after June 24, 2002;

3. Who is the last responsible employer;

4. Did Claimant sustain an injury on April 21, 1999 and/or January 17, 2000 through April 14, 2000;

5. Did Claimant's injury on April 21, 1999 and/or his cumulative trauma injury sustained from January 17, 2000 through April 14, 2000 arise out of and in the course of employment;

6. Is the claim against CB Tech is barred by the time limits of Section 12 and Section 13;

7. Does Section 8(f) apply to Claimant's April 21, 1999 injury and/or his cumulative trauma injury sustained from January 17, 2000 through April 14, 2000;

8. What is Claimant's average weekly wage for the period of his employment with CB Tech;

[3] At trial, the following two additional issues were identified: 1) whether Claimant was permanently partially disabled at BH from August 14, 1999 through January 15, 2000; and 2) What was Claimant's wage earning capacity during his employment at Terminix from March 13, 2001 until June 30, 2002. Both of these issues have been resolved by the parties: BH accepted liability for Claimant's wage loss from August 14, 1999 through January 15, 2000, and the parties stipulated to Claimant's average weekly wage at Terminix (see stipulations).

9. Is Claimant is entitled to medical benefits, under Section 7?

SUMMARY OF DECISION

As a result of his work at CB Tech from January 17, 2000 through April 14, 2000, Claimant sustained a cumulative trauma injury ("the 2000 injury") which aggravated his pre-existing condition. Because Claimant did not sustain any subsequent, work-related, aggravating injury, CB Tech is the last responsible employer and is liable for Claimant's compensation and medical benefits beginning April 15, 2000. In accordance with Sections 12 and 13, Claimant timely noticed and filed his claim for the 2000 injury. Claimant's average weekly wage at CB Tech was $714.19. Claimant was temporarily totally disabled following April 14, 2000 and continuing through March 11, 2001. Claimant was temporarily partially disabled beginning March 12, 2001 and continuing through February 8, 2002. Claimant was permanently partially disabled beginning February 9, 2002 and continuing through June 24, 2002. Claimant has been temporarily totally disabled since June 25, 2002.

SUMMARY OF EVIDENCE

Claimant first went to work for Bay Harbor in 1989 as a laborer. Tr 34. On April 8, 1997, while sealing the floor of a ship, Claimant injured his back. Tr 38. Later that day, he was treated at the emergency room of the Kaiser Foundation Medical Center. Tr 40; BHX-9, p. 479-80. Tr 41. Claimant was diagnosed with acute severe lumbosacral muscle strain, BHX-9, p. 441, and was placed on off-work status. BHX-9, p. 479. When he returned to work, Claimant testified that he performed all of his usual duties as a laborer, albeit with some pain, and that he was not experiencing pain or numbness in his legs, nor episodes of falling down.[4] Tr 41. Soon after his return, Claimant was promoted to supervisor. Tr 42. As a supervisor, Claimant eliminated the majority of the heavy work that he was previously required to do.

Claimant continued to receive medical care for his back condition. On October 3, 1997, an MRI scan was performed. BHX-5, p. 142. The radiologist's report indicates that Claimant had "degenerative disc disease at the L4-5 and L5-S1 levels. Mild, diffuse annular bulge at L4-5. Question of diffuse annular bulge eccentric to the left versus based left paracentral disc herniation at the L5-S1 level." Additionally, the report noted minimal flattening of the ventral aspect of the thecal sac due to the L4-5 bulge. On October 18, 1997, Claimant's chiropractor, Dr. Raymond Yoza, noted that Claimant had suffered "several exacerbations during the past couple of months." BHX-5, p. 138. He opined that "there may be residuals due to this injury." BHX-5, p. 140. On April 29, 1998, at the request of BW, Claimant was examined by Dr. David Y. Kimura. BHX-6, p. 227. Like Dr. Yoza, Dr. Kimura felt that Claimant would "continue to have intermittent recurrences and aggravations in the future . . ." BHX-6, p. 229.

[4] Although Claimant recalled no pain in his legs following the 1997 injury, according to Dr. Porter Turnbull's report, Claimant did report some pain and numbness in his legs for about a week and a half following the 1997 injury. BHX-5, p. 154.

At the hearing, Claimant testified that he re-injured his back on April 20, 1999 while moving heavy buckets.[5] Tr 46; BHX-9, p. 426. Claimant was treated at Kaiser and placed in an off work status. BHX-9, p. 426. The initial Kaiser medical report indicates that Claimant was suffering from a "probable recurrence of old injury" and lists the date of injury as April 8, 1997. BHX-9, p. 426. On April 22, 1999, Claimant returned to Kaiser and was examined by Dr. Jane Fryberg. BHX-9, p. 425. Claimant informed Dr. Fryberg he had been in some pain ever since the 1997 injury and that he had a recent episode of more severe pain on awakening one morning. Dr. Fryberg characterized Claimant's condition as an "exacerbation of low back pain with past history of L5-S1 herniation." BHX-9, p. 425.

Another MRI was performed on June 6, 1999. BHX-9, p. 500. The radiologist concluded that Claimant suffered "degenerative disk disease at L4-5 and L5-S1 with a broad bulge at L5-S1 and a central protrusion at L4-5." BHX-9, p. 500.

On August 4, 1999, Claimant filed a claim, listing April 21, 1999 as the date of injury. BHX-32, p. 1150. However, Claimant's description of the accident reads "injured while applying sealer with a roller to a ship deck," an apparent reference to his April 8, 1997 injury.

On October 28, 1999, Claimant was examined by Dr. John Hannon. BHX-9, p. 395. Claimant reported to Dr. Hannon that his back pain was essentially unchanged during the last several months and that he continued to experience intermittent left leg pain. When Claimant next saw Dr. Hannon, on November 18, 1999, Dr. Hannon determined that Claimant had reached maximum medical improvement. BHX-9, p. 394. Dr. Hannon listed the following permanent restrictions: no lifting or carrying over twenty-five pounds; no repetitive bending or stooping; and no forceful pushing or pulling at greater than twenty-five pounds of force. BHX-9, p. 394.

On January 6, 2000, Dr. Chen Lau of Kaiser examined Claimant. BHX-29, p. 1118. According to Dr. Lau's report, Claimant indicated that the reason for his visit was "recurrent low back pain and left great toe paresthesia." Dr. Lau reported that Claimant had slight diminished sensation along the left L5 dermatome and Dr. Lau found some weakness of the extensor hallucis longus on the left side. He assessed L5-S1 disc herniation with left L-5 radiculopathy. Dr. Lau reported that Claimant was not in acute distress, and continued Claimant on "light work" restrictions. BHX-29, p. 1118.

Beginning sometime in July 1999 and continuing through April 2000, Claimant was also working on a home construction project. Tr 65. Claimant worked on the project every weekend. Tr 110; BHX-22, p. 738. Claimant testified that, due to his back problems, he arranged to do only the lighter work on the project and that his family doctor cleared him to perform these tasks. Tr 66. Claimant stated that the majority of his work was performed standing up and that he was rarely required to stoop, squat, or twist. Tr 67. Claimant's duties included hammering, nailing, putting in screws, caulking, and painting. Tr 109-114. He also carried eight foot two-by-fours, one at a time, Tr 111, and lifted paint in five gallon containers, Tr 120. Claimant testified that he

[5] Claimant's testimony regarding the immediate cause of this injury is inconsistent with the reports of two examining physicians, Dr. Fryberg and Dr. Kimura. BHX-9, p.425; BHX-6, p. 213. Both reports indicate that Claimant's 1999 exacerbation began when he awoke in pain one morning and neither specifies that moving buckets was the cause of the injury.

never had a problem lifting the containers. Tr 120. Claimant stated that his pain did not increase due to these activities. Tr 67.

Because his pay had been reduced following the 1999 injury, Claimant left Bay Harbor and went to work for CB Tech. Tr 53, 329. Claimant testified that his first day at CB Tech was January 17, 2000. He was paid $17.00 per hour. BHX-21, p. 635. Claimant informed CB Tech of his pre-existing back condition and indicated that Bay Harbor was covering his related medical needs. Tr 53. Although Claimant believed his work at CB Tech would be similar to that at Bay Harbor, he testified that the work at CB Tech was more strenuous than he expected and that it was beyond his restrictions. Tr 84. The job required that Claimant carry buckets weighing up to a hundred pounds and to operate large, heavy machines. Tr 57-58. He was also required to bend repetitively, squat, stoop, crawl, work on his knees, twist his upper body, work in cramped spaces and climb ladders. Tr 60-62. Claimant testified that he worked in pain, Tr 73, and that his pain increased while he was employed by CB Tech, Tr 63. Claimant informed Edwin Bocoboc, the president of CB Tech, that his back was "feeling sore," Tr 63, 106, but did not indicate that the soreness was related to his work at CB Tech. Tr 107. Claimant explained that, at the time, he believed Bay Harbor to be responsible for his back condition. Tr 63-64.

On March 24, 2000 Claimant sought treatment from Dr. Hannon at Kaiser. BHX-29, p. 1113; CBX-V, p. 254. Dr. Hannon's report lists April 8, 1997 as the date of injury. Claimant reported to Dr. Hannon that he was experiencing continuing low back pain with intermittent radiation down his left lower extremity and occasional numbness of the left great toe. BHX-29, p. 1113. Claimant also reported that his legs had given out due to back pain.[6]

On April 17, 2000, CB Tech notified Claimant that the company did not have enough work and that Claimant was being laid off.[7] Tr 69; CBX-E, p. 14. Claimant earned a total of $8,572.25 while at CB Tech. CBX-E, p. 9. According to CB Tech's payroll records, he worked 454 total regular hours and 33.5 overtime hours. CBX-E, p. 9. Claimant received a total of twelve checks from CB Tech, each check reflecting pay for a one week period. CBX-E, p. 9. After his lay off, Claimant received unemployment benefits. CBX-E, p. 35.

Claimant's counsel wrote a letter to OWCP dated May 1, 2001 advising that a worker's compensation claim would be filed against CB Tech. CBX-E, p. 46. A copy of this letter was also sent to CB Tech. Claimant filed an LS-203 Claim for Compensation on May 16, 2001, asserting a cumulative trauma injury on April 29, 2000.[8] Claimant stated that he did not file a claim against CB Tech immediately following his employment there because he believed that his symptoms were a result of his injuries while at Bay Harbor. Tr 81. Claimant was represented by counsel during his employment at CB Tech and after. Tr 100-01.

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[6] In his deposition, Claimant testified that he did not experience an episode of leg buckling while at CB Tech. CBX-H, p. 113. However, based on Dr. Hannon's report, Claimant's collapse clearly occurred while he was at CB Tech.

[7] Claimant's last day of work was April 14, 2000. CBX-E, 1, 2.

[8] At the hearing, Claimant's counsel clarified that the cumulative trauma allegation is for the entire period of Claimant's employment at CB Tech. However, Claimant's employment at CB Tech ended on April 14, 2000, not on April 29, 2000.

Following his lay-off from CB Tech, Claimant continued to receive medical treatment for his back condition. On July 28, 2000, Dr. John Hannon of Kaiser noted that Claimant's condition was unchanged from previous visits and indicated that Claimant's present restrictions were permanent. BHX-29, p. 1108. Claimant was again examined on December 29, 2000. BHX-29, p. 1105. Claimant reported an exacerbation of back pain while bending over to pick something up, but stated that the symptoms related to that episode had resolved. Dr. Hannon's assessment of Claimant's condition continued to be the same. Both of these reports indicate April 8, 1997 as the date of injury.

Terminix hired Claimant as a pest control specialist on March 12, 2001. BHX-22, p. 799; CBX-H, p. 78. The Terminix job generally entailed spraying and baiting bugs, and Claimant usually treated sixteen to seventeen houses a day. BHX-21, p. 669; Tr 127. Claimant was required to lift a backpack containing no more than three gallons of liquid. Tr 75. While at Terminix, Claimant was sometimes required to crawl into small, confined spaces, to stoop, and to squat. Tr 126. Claimant testified that his work at Terminix did not increase his symptoms and that he did not injure himself while on the job. Tr 75, 77, 134.

Dr. Paul J. Smith at Kaiser examined Claimant on May 30, 2001. The report lists Claimant's date of injury as April 8, 1997. BHX-29, p. 1101. Claimant informed Dr. Smith that he felt a "sharp poking pain" on awakening in the morning. Claimant was placed in an off-work status for the day of the exam and was returned to limited duty on May 31, 2001. Dr. Smith noted that Claimant "remains medically stable and at maximum medically [sic] improvement." BHX-29, p. 1102.

While at home following work on June 24, 2002, BHX-30, p. 1122, Claimant collapsed after one of his legs "went out." Tr 79. Claimant testified that he had been asleep prior to this incident and was not engaged in any activity that might have caused him to collapse. Tr 79. Claimant stated that he had only performed six or seven jobs for Terminix that day and that he was not experiencing increased pain when he left work. Tr 78-79. Claimant went to the St. Francis Emergency room for treatment. BHX-30, p. 1122. The medical record of that visit indicates that Claimant reported increased back pain during the four days preceding his collapse. BHX-30, p. 1122-23.

Claimant went to see Dr. Bradley Lee at the Straub Clinic on June 25, 2002. BHX-28, p. 1041. Claimant reported " shooting pain that runs down the medial calf…[and] episodes where he felt as though he could not control the lower extremity on the left" over the prior three days. BHX-28, p. 1041. Dr. Lee took Claimant off work, BHX-28, p. 1041, and advised him to avoid excessive bending, to avoid twisting of the neck and back, and to do no lifting. BHX-28, p. 1041. Claimant returned to the Straub Clinic on July 3, 2002, reporting on-going pain and tightness in his lower back with occasional shocking-type pain down the left leg to the thigh area. BHX-28, p. 1035. Additionally, Claimant reported two incidents of urinary incontinence.

Dr. Lee referred Claimant to Dr. Gonzalo Chong, a neurosurgeon, who examined Claimant on August 12, 2002. BHX-28, p. 1027. Dr. Chong concluded that Claimant had "disk protrusions at L4-5 and L5-S1 with chronic, presently incapacitating left lumbosciatic pain." BHX-28, p. 1028. He felt that surgical intervention should be "strongly considered." Dr. Chong

ordered an MRI, which was performed on August 30, 2002. BHX-16, p. 532. With Claimant's 1999 MRI as a comparison, the 2002 MRI report indicated the following impression:

> Left paracentral and foraminal focal disc bulging at L4-5, which has slightly progressed with increased mild to moderate central and left neural foraminal stenosis. This is superimposed on diffuse disc bulging, which also results in mild to moderate right neural foraminal stenosis which has progressed. Slightly increased left paracentral focal disc bulging at L5-S1, with increased mild to moderate central canal and mild to moderate left neural foraminal stenosis.

BHX-16, pp. 532-33.

On October 8, 2002, a lumbar discogram-CT scan was performed and the report indicated the following impression:

> Both discograms abnormal with annular tears, but no extravasation at either level. Both discs injected reproduced patient's low back pain, severity of pain was more marked at L4-5.

BHX-15, pp. 530-31.

Claimant has not worked since his collapse in 2002. Tr 88. He collected temporary disability insurance ("TDI") for a period of time following his 2002 collapse. Tr 86; BHX-23, pp. 832-33. His TDI coverage was eventually exhausted and, at that point, Claimant ceased to receive compensation of any kind. Tr 88. Claimant's earnings while at Terminix in the fifty-two week period prior to June 30, 2002 totaled $36,498.53. BHX-23, pp. 850-54.

Dr. Gilbert Hager

Dr. Hager, who testified as an expert witness on behalf of Claimant, is board certified as a specialist in Physical Medicine and Rehabilitation. Tr 137. Dr. Hager examined Claimant on February 9, 2002. Tr 156. In his report, Dr. Hager listed multiple dates of injury for Claimant: April 8, 1997; April 21, 1999; and April 2000. Dr. Hager diagnosed a herniated disk at the L5-S1 level, with radiculitis[9] by history and by the previous MRI findings. Dr. Hager opined that Claimant's back condition was caused by the 1997 injury and was permanently aggravated by Claimant's work at CB Tech. Tr 157. He deemed Claimant's impairment permanent and stationary. CX-3, p. 48.

Dr. Hager next examined Claimant on March 2, 2003, at which time he found that Claimant's symptoms had increased. Tr 167-68, 230. Dr. Hager reported: spinal flexion was decreased; tenderness in the lumbosacral area, in the midline over the spine, and over the paraspinus muscles; straight leg positive with radiation into the lower extremity; decreased sensation in the S-1 dermatome, lateral calf and lateral top of the foot; and atrophy of the exterior digitorous brevis muscle. Tr 167-68. Dr. Hager stated that, based on the straight leg raising findings, there was a progression in Claimant's condition between the February 2002 and March

[9] Inflammation of the nerve root.

2003 examinations. Tr 208. Dr. Hager did not believe the changes between 2002 and 2003 were the result of a natural progression, but rather opined that they were caused by a specific event. Tr 209-10. He stated that the specific causal event was unknown.

At trial, Dr. Hager discussed Claimant's 1997, 1999, and 2002 MRI reports. Dr. Hager's interpretation of the MRIs was based on his review of the reports from the radiologists, not on the MRI scans themselves. Tr 183-84. Dr. Hager opined that Claimant's 2002 MRI showed further progression of disk pathology. Tr 154.

Dr. Hager testified that, to a reasonable degree of medical certainty, the progression of disk herniation evidenced in the August 30, 2002 MRI was a result of Claimant's work while at CB Tech, Tr 170, and was not due to natural progression, Tr 193. Dr. Hager opined that the type of work Claimant was doing while at CB Tech accelerated, worsened or hastened the degeneration of Claimant's condition to the point that Claimant was no longer able to return to his work in the shipyards. Tr 160-64.

Dr. Hager could not rule out the possibility that Claimant's work at Terminix might have worsened Claimant's condition. Tr 172. However, he noted that Claimant had no "acute flare up of his symptoms related to his job activity" at Terminix and opined that Claimant's activities at Terminix would have had the same impact on Claimant's symptoms as would the "normal activities of life." Tr 172. Dr. Hager did not believe that Claimant's lifting while at Terminix would have caused Claimant's back to deteriorate. Tr 236. However, he believed that Claimant's work while at CB Tech caused a daily aggravation from heavy lifting, Tr 230, and was a "major contributor to the progression of his disk derangements," Tr 233. Dr. Hager also stated that bending under cabinets and crawling into confined spaces could have aggravated Claimant's back, but that Claimant's history did not indicate that it did aggravate Claimant's back. Tr 240.

Dr. Hager stated that, following the end of Claimant's employment at CB Tech in April 2000, he would have limited Claimant's duties at work in the following manner: limit lifting to no more than twenty-five pounds, on an occasional basis, with "occasional" defined as less than or equal to thirty-three percent of the time; no bending while carrying a significant load. Tr 166. However, Dr. Hager noted that Claimant "probably could do" stooping, crawling, and climbing stairs. Dr. Hager also would have limited Claimant to standing for no more than one hour. Tr 166. Dr. Hager assessed Claimant's current condition as "permanent impairment related to two levels of disks, at L4-5 and L5-S1." Tr 172. He stated that Claimant would benefit from surgery and should be limited to sedentary work activities. Tr 173. Dr. Hager opined that Claimant's condition could improve. Tr 175.

Dr. Kent Davenport

Dr. Kent Davenport examined Claimant on behalf of CB Tech on January 16, 2003. CBX-J, pp. 157-62. Dr. Davenport is a board certified orthopedic surgeon. CBX-K, pp. 163-165. Dr. Davenport diagnosed left L5-S1 disk herniation and chronic degenerative disk disease lumbar spine. CBX-J, p. 161. He concluded that Claimant's condition stemmed directly from his original injury of April 8, 1997, and was not related to any subsequent episodes.

Dr. James Langworthy

At the request of BH, Dr. James Langworthy reviewed Claimant's medical records and issued a report dated May 17, 2000. BHX-17, pp. 545-54. He opined that Claimant's alleged injury on April 21, 1999 should not be considered a new injury, but rather a continuation of Claimant's back pain resulting from the 1997 injury. BHX-17, p. 553. Dr. Langworthy concluded that Claimant did not incur any additional impairment after April 21, 1997. Dr. Langworthy felt that Claimant would "continue to have similar symptoms for the foreseeable future and typically there will be a waxing and waning of symptoms over time." BHX-17, p. 553. Dr. Langworthy opined that Claimant fit DRE Lumbosacral Category II, five percent permanent impairment of the whole person. BHX-17, p. 553.

Dr. Peter Diamond

Dr. Peter Diamond, a board certified orthopedic surgeon, testified on behalf of BW. Tr 242-43. Dr. Diamond conducted an independent medical examination of Claimant on January 10, 2003, BHX-19, p. 585, and reviewed Claimant's medical records and MRI films. Tr 244. In his report of January 24, 2003, Dr. Diamond opined that the April 1999 accident resulted in a temporary aggravation of Claimant's pre-existing condition. BHX-19, p. 609. Additionally, Dr. Diamond posited that Claimant's disability from the April 2000 injury was the result of a temporary aggravation of the pre-existing condition. Dr. Diamond concluded that Claimant was currently permanently impaired and had reached MMI on December 6, 1999. BHX-19, p. 610-11. He classified Claimant's current impairment as 7% impairment of the whole person, with 5% apportioned to the 1997 injury and 2% apportioned to a previously asymptomatic degenerative disc disease.

In a supplemental report dated February 11, 2003, Dr. Diamond stated that Claimant's current condition appeared to be related to progression of degenerative changes at the L4-5 and L5-S1 levels, with some incremental worsening documented on the August 2002 MRI. BHX-27, p. 1005. He opined that, to a reasonable degree of medical certainty, Claimant sustained a permanent aggravation while working at Terminix. BHX-27, p. 1005. He apportioned fifty percent of Claimant's condition to cumulative trauma based on the nature of Claimant's duties at Terminix.

At the hearing, Dr. Diamond testified that there were changes in Claimant's MRI scans between 1997 and 1999, Tr 244, and that, in 1999, there was a progression of the disease.[10] Tr 246. Dr. Diamond posited that to a reasonable degree of medical probability the kind of work Claimant did at Bay Harbor between 1997 and 1999 contributed significantly to the progression of the disease. Tr 247. When asked to compare Claimant's 2002 MRI to the earlier MRIs, Dr. Diamond stated that Claimant's condition had progressed sometime between the 1999 and 2002 MRIs. Tr 252 He opined that the differences between the MRIs implied injury, not gradual progression of arthritic changes. Tr 248. Dr. Diamond stated that there was also a slightly increased left paracentral focal disk bulging at the L5-S1 with increased central canal and mild-

[10] Obviously, this conclusion conflicts with Dr. Diamond's previous report, in which he concluded that Claimant sustained only a temporary aggravation at CB Tech. BHX-19. Dr. Diamond explained that he changed his opinion after reviewing the MRI evidence.

to-moderate left neural foramen stenosis. Tr 249. Thus, the L5-S1 had progressed from a bulging in 1999 to a focal bulge in 2002. Tr 249. Dr. Diamond opined that the progression could have been caused by twelve weeks of physical work between January 2000 and April 2000. Tr 278-79. He also testified that it could have been caused by the type of work activities Claimant did while at Terminix or by the type of activities Claimant performed while participating in the weekend construction project. Tr 278-79. Dr. Diamond concluded that, although Claimant's condition may have worsened while at CB Tech, it also worsened as a result of his work at Terminix. Tr 283.

Dr. Diamond rated Claimant's impairment at seven percent. Tr 281. He testified that Claimant's 1997, 1999, and 2000 injuries would have all contributed to this impairment, but was unable to apportion Claimant's rating between the three injuries. Tr 281. Dr. Diamond concluded that Claimant is currently a candidate for lumbar surgery and that Claimant is not capable of resuming the type of work he did at Bay Harbor or at CB Tech. Tr 252.

Dr. Stephen Holmes

Dr. Holmes, who testified on behalf of BH, is a neuroradiologist and is board certified in radiology. Tr 295; BHX-40, pp. 1208-1213. Additionally, he has a Certificate of Adequate Qualifications in neuroradiology. Tr 295. Dr. Holmes reviews approximately ten to twenty MRIs a day. Tr 296. He reviewed Claimant's 1997, 1999, and 2002 MRIs, and prepared a report dated January 30, 2003. Tr 297; BHX-41, pp.1214-16. He concluded that there was no difference between the 1997 and 1999 MRIs. Tr 298; BHX-41, p. 1216. Dr. Holmes explained that differences in angulation must be accounted for when interpreting an MRI and that, taking such differences into account, there was no significant difference in the pathologic findings of the 1997 and 1999 MRIs. Tr 301.

Dr. Holmes disagreed with the findings of the radiologists who authored the MRI reports in 1997 and 1999. Tr 304-05. In contrast to the 1997 report, Dr. Holmes' characterization of the 1997 MRI would be "a broad-based left protrusion at L5-S1." Tr 307. Dr. Holmes also felt that the 1997 MRI showed two protrusions, one at L5-S1 and one at L4-5. Tr 307. Regarding the 1999 MRI, Dr. Holmes testified that the protrusion at L5-S1 remained stable and that he would characterize the L4-5 protrusion as left paracentral, not central. Tr 307. In essence, he concluded that the positive findings present in the 1999 MRI were also present in the 1997 MRI. Tr 307.

Comparing the 1999 MRI to the 2002 MRI, Dr. Holmes felt there had been a change at both the L4-5 and the L5-S1 levels. Tr 308. He opined that this change was not due to natural progression. Tr 312, 317. Dr. Holmes stated that carrying weights of between twenty and ninety pounds on a regular basis, using push machines that weighed as much as 1200 pounds and jack hammers that weighed as much as sixty pounds, as Claimant did while at CB Tech, was more likely to make a condition like Claimant's progress than was Claimant's work at Terminix. Tr 317. Although Dr. Holmes could not rule out the possibility that Claimant's work activities at Terminix caused the progression of his back condition between 1999 and 2002, Tr 318, he averred that it was more likely that Claimant's work at CB Tech was the cause, Tr 317, 320.

Mr. Edwin Bocoboc

Mr. Edwin Bocoboc, president of CB Tech, testified on behalf of CB Tech. Tr 322. Mr. Bocoboc stated that Claimant began work on January 17, 2000. Tr 329. Claimant informed Mr. Bocoboc that Bay Harbor would be responsible for any flare ups of his condition. Tr 331.

Mr. Bocoboc stated that Claimant's employment ended on April 14, 2000 due to lack of work. Tr 332. According to Mr. Bocoboc, Claimant never informed him that he had an injury on the job at CB Tech. Tr 333. Mr. Bocoboc testified that Claimant never complained of back pain while on the job at CB Tech. Tr 334. Mr. Bocoboc was not notified that Claimant was alleging an injury while at CB Tech until May 2001, when he received a letter from Claimant's counsel. Tr 334. Mr. Bocoboc stated that he never told Claimant that he was being hired for lighter duty or for work that did not require a lot of physical labor, and Claimant never asked for such work. Tr 337-38.

ANALYSIS

Responsible Employer

Claimant argues that he sustained a cumulative trauma injury during his employment with CB Tech, which aggravated his pre-existing injury. As a result, Claimant asserts, he was permanently totally disabled beginning April 15, 2000 and continuing through March 11, 2001, and then permanently partially disabled beginning on March 12, 2001 and continuing through June 24, 2002. Claimant contends that he has been temporarily totally disabled beginning June 25, 2002 as a result of the natural progression of his pre-existing injury, last aggravated by his work at CB Tech. Claimant thus argues that CB Tech is the last responsible employer and is liable for Claimant's compensation and medical care after April 14, 2000.

BW asserts that, on April 21, 1999 while working for BH, Claimant sustained an injury, which was a permanent aggravation of Claimant's 1997 injury. Regarding the allegation of cumulative trauma in 2000, BW argues Claimant permanently aggravated his back while working for CB Tech and, as a consequence, that CB Tech is liable for Claimant's disability following April 14, 2000. However, BW contends that Claimant sustained another cumulative trauma injury while working at Terminix; thus, BW argues that Terminix is the last responsible employer and is liable for Claimant's compensation and medical care following June 24, 2002.

BH argues that Claimant did not sustain an injury on April 21, 1999 and that Claimant's condition following April 21, 1999 was the result of the natural progression of his pre-existing injury of April 8, 1997. Even assuming Claimant did sustain an injury on April 21, 1999, BH contends that the injury was at most only a temporary aggravation. BH next asserts that Claimant sustained a permanent aggravation of his 1997 injury as a result of cumulative trauma sustained between January 17, 2000 and April 14, 2000 while working at CB Tech. Contending that Claimant further injured his back while at Terminix, BH concludes that Terminix is liable for Claimant's compensation and medical care following June 24, 2002.

CB Tech concedes that the Claimant's condition worsened following the 1997 injury, but argues that change may have occurred "while Claimant was building his home on the weekends from approximately July 1999 until April 2000 . . . or [during] his employment with Terminix." ALJX-9, p. 15. Even if Claimant did sustain a cumulative trauma injury while at CB Tech from January 17, 2000 through April 14, 2000, CB Tech asserts that Claimant's current disability is the result of a later cumulative trauma injury occurring at Terminix, and that CB Tech's liability ended on March 13, 2001.[11]

Because of the way the issues have been raised and argued, I will structure my analysis as follows: (1) whether Claimant sustained an injury on April 21, 1999 that arose out of and in the course of employment; (2) whether Claimant sustained a cumulative trauma injury from January 17, 2000 through April 14, 2000, which aggravated his pre-existing injury; and (3) whether BW, BH, or CB Tech is the last responsible employer after June 24, 2002, the last day Claimant worked for Terminix.

Claimant's Alleged Injury on April 21, 1999

The parties have identified several issues related to Claimant's alleged injury in 1999 including: 1) the fact of injury on April 21, 1999, 2) whether, if Claimant did sustain an injury on April 21, 1999, that injury arose out of and in the course of employment; and 3) the last responsible employer (see full discussion of this issue below). In essence, the parties raise the above issues because, should I find that Claimant sustained an aggravating injury at BH on April 21, 1999, but that he *did not* sustain an aggravating injury thereafter, I would be compelled to conclude that BH was the last responsible employer. Although neither BW nor CB Tech explicitly raises this defence to liability under the last responsible employer rule, it remains a potential issue that must be addressed.

Because I find that Claimant sustained an aggravating injury sometime after he ceased to be employed by BH, I decline to make a determination regarding the fact of injury on April 21, 1999. Based on the compelling MRI evidence presented by Dr. Holmes and discussed in detail below, Claimant's current condition clearly worsened as a result of an injury that occurred between his June 6, 1999 MRI and his August 30, 2002 MRI. Given this finding, even if Claimant did sustain an injury on April 21, 1999, he subsequently aggravated that injury. Thus, the alleged April 21, 1999 injury is irrelevant to the determination of last responsible employer. Since compensation for Claimant's 1999 injury is not at issue,[12] the causality of Claimant's 1999 injury is moot and the issue need not be further analyzed.

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[11] CB Tech argues in its post-trial brief that March 13, 2001 is the end date of its liability, basing that date on Claimant's first day of employment at Terminix. However, Claimant's first day of work at Terminix was March 12, 2001, not March 13, 2001.

[12] BH has assumed responsibility for Claimant's compensation during the relevant period (see footnote 3).

Causality of Low Back Condition after January 15, 2000 through June 24, 2000

The parties dispute whether Claimant sustained an injury following January 15, 2000, his last day of employment at BH. Claimant contends that he sustained a cumulative trauma injury while at CB Tech, from January 17, 2000 through April 14, 2000. CB Tech argues that the progression of Claimant's condition after January 15, 2000 could have been caused by his volunteer work on a home construction project or by his employment at Terminix.

To be compensable under the Longshore Act, an injury must arise out of and in the course of employment. Section 20(a) provides that "in any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary — (a) that the claim comes within the provisions of the Act." 33 U.S.C. §920(a). To invoke the 20(a) presumption, the claimant must establish a *prima facie* case of compensability by showing that he or she suffered some harm or pain, *Murphy v. SCA/Shayne Brothers*, 7 BRBS 309 (1977), *aff'd mem.*, 600 F.2d 280 (D.C. Cir. 1979), and that working conditions existed or an accident occurred that could have caused the harm or pain, *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). A claimant is entitled to invoke the presumption if he or she presents at least "*some* evidence tending to establish" both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990). However, when the identity of the last responsible employer is at issue, one employer may not invoke the 20(a) presumption against another. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999).

Claimant is able to establish a *prima facie* case by invoking the Section 20(a) presumption. It is undisputed that Claimant has had ongoing low back problems following his first injury on April 8, 1997. Claimant testified that, during his employment with CB Tech, he was working in pain, and that his pain increased. Additionally, Dr. Hannon's report of March 24, 2000 indicates that Claimant's symptoms worsened during his employment with CB Tech. Most notably, Claimant reported that his legs buckled, causing him to fall down. CBX-V, p. 254. Dr. Hager opined that Claimant's work at CB Tech contributed to the progression of disc herniation evident in the 2002 MRI. Dr. Holmes testified that the type of work Claimant was obliged to perform at CB Tech would make Claimant's low-back condition progress. Based on this evidence, Claimant has invoked the 20(a) presumption.

Once the Section 20(a) presumption is invoked, the burden shifts to the employer. To rebut the presumption, the employer must present substantial evidence that the injury was not caused by the claimant's employment. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case, and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). The ultimate burden of proof then rests on the claimant under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994). *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

While I find some aspects of CB Tech's argument unpersuasive, enough evidence has been presented to rebut the 20(a) presumption. CB Tech argues that Claimant's volunteer work on a home construction project could have caused the progression of Claimant's condition during the months he worked at CB Tech.[13] In support of this argument, CB Tech points out that Claimant admitted to lifting five gallon buckets of paint during the construction project. CB Tech asserts that such lifting, which it contends amounted to at least forty pounds,[14] exceeded Claimant's restrictions. Alternatively, CB Tech asserts that the progression of Claimant's condition from April 14, 2000 through June 24, 2000 was the result of Claimant's work at Terminix.

I find CB Tech's argument regarding the home construction project unpersuasive. Claimant's testimony regarding the paint buckets was limited to an admission that he carried paint and that the paint was in five gallon containers. There is no evidence in the record indicating whether Claimant carried full buckets, how often or how far he carried the containers. Moreover, Claimant stated that he did not have a problem lifting the buckets. CB Tech points to no medical evidence in support of its contention that the home construction project caused the progression of Claimant's back condition. Dr. Davenport, who testified on behalf of CB Tech, only notes that Claimant performed the construction work. He offers no opinion as to whether such work contributed to the progression of Claimant's back condition. The only medical evidence in the record supporting this argument is the testimony of Dr. Diamond who, on cross-examination, agreed that the progression of Claimant's low-back condition between 1999 and 2002 could have been caused by Claimant's work on the home construction project. Such evidence is insufficient to sustain CB Tech's burden.

However, BW, BH, and CB Tech have presented enough evidence that Claimant aggravated his back while at Terminix to rebut the 20(a) presumption. Because this evidence is properly analyzed under the framework of the last employer rule, I weigh the evidence on this issue in the subsequent section.

Whether BW, BH, or CB Tech is the Last Responsible Employer

BW, BH, and CB Tech argue that Claimant suffered a cumulative trauma injury while employed at Terminix from March 12, 2001 through June 24, 2002, and that neither BW, BH, nor CB Tech is liable for Claimant's disability following June 24, 2002.[15] Claimant contends that he did not suffer a new injury while at Terminix and that CB Tech is the last responsible employer. Because I find that Claimant's last aggravating injury occurred while he was employed at CB Tech, I conclude that CB Tech is the last responsible employer.

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[13] CB Tech's argument regarding the construction project and Terminix was made in the context of the issue of notice. However, since CB Tech also contests whether Claimant's 2000 injury arose out of and in the course of employment, I presume that this argument extends to causation as well.

[14] One gallon of water weighs 8.33 pounds. See http://ga.water.usgs.gov/edu/waterproperties.html

[15] BH, BW, and CB Tech cannot invoke the Section 20(a) presumption to prove that Claimant suffered a new injury while employed by Terminix. *Buchanan,* 33 BRBS 32.

When a claimant's disability is attributable to a series of injuries suffered while working for more than one employer, under the "last responsible employer" rule, the claimant's last employer may be held liable for the entire resulting impairment. *Foundation Constructors v. Director, OWCP,* 950 F.2d 621, 623 (9th Cir. 1991). The Ninth Circuit recognizes two tests for determining last responsible employer, one for occupational disease cases, such as asbestosis, and another for multiple or cumulative trauma cases. If the disability is an occupational disease, the "last employer rule" provides that the employer which last exposed the claimant to injurious stimuli, prior to the date upon which the claimant became aware of his work-related disability, is the responsible employer. *Metropolitan Stevedore v. Crescent Wharf, et al., and Price* (hereinafter "*Price*"), 339 F.3d 1102 (9th Cir. 2003); *Traveler's Insurance Co. v. Cardillo,* 225 F.2d 137, 145 (2nd Cir. 1955), *cert. denied,* 350 U.S. 913 (1955). In a multiple trauma case, the aggravation test or two-injury test (hereinafter, "the aggravation test") determines the "last responsible employer" based on the cause of the claimant's ultimate disability. A cumulative trauma is analyzed under the aggravation test.[16] *Keliata v. Director, OWCP*, 799 F.2d 1308.

Given the nature of Claimant's injuries, the aggravation rule is the appropriate test for determining the last responsible employer in the instant case. The rule is applied as follows:

> If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding the subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury *aggravating, accelerating or combining with a prior injury* to create the ultimate disability, . . . the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer.

Price, 339 F.3d at 1102 (citing *Foundation*, 950 F.2d at 624).

In *Price*, the court discussed the virtue of the "last responsible employer" rule. The court recognized that it might seem harsh to assign liability to Metropolitan, the last employer for whom the claimant had worked for only one day, that day followed by knee surgery scheduled several months prior, and when the claimant had been suffering from a knee condition for years. The court explained that the rule allowed each employer subject to the Act to share the risk.

> The unfairness to the last employer is mitigated by two factors: the spreading of the risk through mandatory insurance, and the availability of the second injury fund to the last employer in some cases. As the court stated in *Foundation Constructors*, "this rule serves to avoid the difficulties and delays connected with trying to apportion liability among several employers, and works to apportion liability in a roughly equitable manner, since all employers will be the last

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[16] Although some state courts have come to a contrary conclusion, the Ninth Circuit has held that cumulative trauma is not an occupational disease. *See Foundation Constructors v. Director,* 950 F.2d 621 (9th Cir. 1991) (holding that a back condition that resulted from repeatedly operating jackhammers and lifting 100-pound weights did not constitute an occupational disease.); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986) (upholding the Benefits Review Board's decision that cumulative trauma to a claimant's arm did not amount to an occupational disease).

> employer a proportionate share of the time." *Foundation*, 950 F.2d at 623. Having a bright line rule eliminates the need for costly litigation and helps ensure that workers receive timely and adequate compensation for their injuries under the LHWCA.

Price, 339 F.3d at 1102.

As an initial matter, I find that BW is not the last responsible employer. Every examining physician or medical expert who reviewed Claimant's MRI results opined that, at sometime following the June 6, 1999 scan and preceding the August 30, 2002 scan, Claimant sustained an aggravation of his prior injury. Most importantly, Dr. Holmes, whose credentials as a neuro-radiologist render him the best qualified expert on this point, testified that between the 1999 and 2002 MRIs, there was a change, not the result of natural progression, at both the L4-5 and the L5-S1 levels. While Drs. Davenport and Langworthy both concluded that Claimant did not sustain an aggravation following his 1997 injury, neither doctor reviewed Claimant's 2002 MRI results. Accordingly, I find that Claimant sustained an aggravation of his 1997 injury some time between June 6, 1999 and August 30, 2002. During this time period, Claimant worked for CB Tech, BH, and Terminix, but not for BW. Therefore, under the last responsible employer rule, BW is not liable for Claimant's current disability.

I further find that BH is not the last responsible employer. Although Claimant continued to work for BH subsequent to the June 6, 1999 MRI,[17] he was working within his restrictions during this time. Indeed, Claimant was required to accept a decrease in pay because of the necessity of restricting his duties. Moreover, on November 18, 1999, while still employed with BH, Dr. Hannon determined that Claimant had reached maximum medical improvement. Since Claimant's symptoms stabilized while he was working at BH after June 6, 1999, there is no evidence that the aggravation apparent in the 2002 MRI occurred during this time period.

Even assuming Claimant did aggravate his 1997 injury while at BH, the evidence supports a finding that Claimant's work at CB Tech also aggravated Claimant's pre-existing injury. According to Claimant's uncontradicted testimony, during the time that Claimant was at CB Tech, he was working outside his restrictions. Concurrently, his symptoms worsened dramatically. Not only did Claimant credibly testify to this deterioration, the medical evidence supports his testimony. On March 24, 2000, Claimant reported to Dr. Hannon that he had fallen down after his legs buckled. Claimant had never before suffered such an episode. Drs. Hager, Holmes, and Diamond averred that the heavy lifting required by Claimant's job at CB Tech could have caused the aggravation evidenced in the MRI scans. Based on the foregoing evidence, I find that Claimant aggravated his injury while at CB Tech.

However, CB Tech would not be liable under the last responsible employer rule if Claimant's work while at Terminix caused an aggravation of his condition. When an injury covered under the Longshore Act is subsequently aggravated by a later injury not covered by the Longshore Act, the later injury is not compensable in a longshore claim.[18] *Leach v. Thompson's*

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[17] Claimant returned to his duties at BH on August 11, 1999.

[18] A different rule applies in occupational disease cases. In an occupational disease case, the last employer

Dairy, Inc., 13 BRBS 231 (1981). *See also Brown v. Bath Iron Works Corp.*, 22 BRBS 384, 388 (1989). I find that Claimant did not sustain a cumulative trauma injury at Terminix and that CB Tech is therefore the last responsible employer.

Claimant's medical records are inconclusive on the causation of Claimant's June 24, 2002 collapse and his ensuing disability and there is some support for a finding that Claimant sustained an aggravation while at Terminix. First, contrary to Claimant's argument and to the assertion of Dr. Hager, Claimant clearly had problems with his back while at Terminix prior to his June 24, 2002 collapse. On May 30, 2001, he experienced a flare-up of back pain serious enough that he sought a doctor's care. Claimant was treated at Kaiser, where he reported that he had experienced a "sharp poking pain" on awakening. Additionally, although Claimant testified at trial that his June 24, 2002 collapse occurred after he awoke from a nap, and without a prior increase in pain, Claimant's medical records indicate that he was experiencing pain for three or four days prior to his collapse. Therefore, Claimant was clearly "having problems" with his back prior to June 24, 2002. Moreover, after CB Tech and before Terminix, Claimant suffered no flare-ups severe enough to cause him to seek medical attention[19] and his condition was essentially "unchanged"[20] during this period. Finally, Drs. Hager, Diamond, and Holmes each testified that Claimant's work at Terminix could have caused Claimant's condition to worsen, contributing to his current disability. On cross-examination, Dr. Hager went so far as to opine that some unknown event caused Claimant's condition to worsen between Dr. Hager's 2002 and 2003 examinations of Claimant. That is, Claimant's own doctor testified that Claimant sustained an injury after he left CB Tech.

However, there is also evidence to support a finding that Claimant did not sustain an aggravation while at Terminix. First, although several doctors testified that they could not rule out the possibility that Claimant's work at Terminix aggravated his low-back condition, Drs. Hager and Holmes opined that Claimant's work at CB Tech "more likely" aggravated his injury.[21] Moreover, during the time that Claimant was employed at Terminix, he was working within his restrictions, while his work at CB Tech exceeded his restrictions.

Next, Claimant's collapse on June 24, 2002 was arguably the last in a series of flare-ups occurring on a periodic basis after Claimant left CB Tech. This includes a flare-up during his

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covered by the Longshore Act who causes or contributes to an occupational injury is completely liable for that injury, regardless of whether the disability was aggravated by subsequent, non-covered employment. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1287 (9th Cir. 1982).

[19] Although on December 29, 2000 Claimant saw Dr. Hannon at Kaiser and reported that he had experienced low back pain with radiation down his left leg while he was bending over to pick up an object, the incident had occurred a couple of weeks prior to his visit. Claimant reported to Dr. Hannon that his symptoms had resolved and this episode does not appear to have been the motivation behind Claimant's December 29, 2000 visit.

[20] See May 30, 2000 and July 28, 2000 reports by Dr. Hannon. BHX-29, pp. 1108, 1005.

[21] Dr. Diamond also testified that Claimant's volunteer work could have aggravated his low back. However, I have already determined that the evidence does not support a finding that Claimant's volunteer work caused Claimant's 1999 injury and the same reasoning applies to the instant issue. Accordingly, I need not further analyze this issue.

period of unemployment, sometime around December 29, 2000; another flare-up five months later, on May 30, 2001 while Claimant was employed at Terminix; and finally the June 24, 2002 collapse. Drs. Langworthy, Yoza, and Kimura all opined that Claimant's initial 1997 injury was such that recurrent flare-ups should be expected. Thus, the symptoms Claimant experienced on May 30, 2001 and just prior to June 24, 2002, are more likely flare-ups caused by the natural progression of Claimant's pre-existing injury than by any new aggravation at Terminix. Moreover, Claimant's collapse on June 24, 2002 was very similar to his collapse at CB Tech on March 24, 2000, and was not some new or more serious symptom that only appeared following Claimant's employment with Terminix.

In sum, there is compelling evidence on both sides. When, as here, the evidence is in equipoise, the party with the burden of proof loses. Since the burden is on CB Tech to show that it is not the last responsible employer, I find that Claimant's collapse on June 24, 2002 and his ensuing disability are the result of the natural progression of Claimant's pre-existing injury, last aggravated while Claimant was employed at CB Tech. Accordingly, CB Tech is the last responsible employer and is liable for Claimant's compensation and medical benefits after June 24, 2002.

Timeliness

Section 12 – Notice of Injury

Claimant asserts that he gave timely notice of his claim for cumulative trauma against CB Tech. Claimant argues that he was not obligated to give notice until he became aware of his injury and that he was not aware of his injury until well after the end of his employment with CB Tech. Claimant points out that he was not diagnosed as having suffered cumulative trauma until February 9, 2002, when Dr. Hager first examined him. Prior to that, Claimant asserts, his treating physicians all identified April 8, 1997 as the date of injury, leading Claimant to reasonably believe that his condition was a result of the earlier incident.

CB Tech argues that Claimant failed to provide timely notice of his injury. CB Tech contends that Claimant was required to give notice of his injury within thirty days of April 14, 2000, Claimant's last day of work at CB Tech. Because Claimant did not notify CB Tech of his cumulative trauma injury until approximately May 1, 2001, CB Tech urges that the claim is barred by the statute of limitations. Finally, CB Tech argues that it was prejudiced by the late notice because it could not investigate the cause of Claimant's back condition until after Claimant had begun to work for Terminix. Thus, CB Tech argues it is now unable to establish the extent to which Claimant's work at CB Tech, rather than his subsequent work at Terminix, caused the progression of Claimant's condition.

Section 12(a) requires that notice of a traumatic or cumulative trauma injury for which compensation is payable be given within thirty days after the date of the injury, or within thirty days after the claimant is aware of a relationship between the injury and his employment. 33 U.S.C. § 912(a). In the absence of substantial evidence to the contrary, it is presumed that the

employer has been given sufficient notice. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Claimant did not notify CB Tech of his injury within thirty days of April 14, 2000, the last day on which Claimant could have sustained cumulative trauma as a result of his work at CB Tech. However, Claimant's notice would still be timely if given within thirty days of the date on which he became aware that CB Tech might be liable under the last responsible employer rule. Because the awareness provisions of Sections 12 and 13 are identical, *Bivens v. Newport News Shipbuilding and Dry Dock Co*., 23 BRBS 233 (1990), the following discussion includes references to case law analyzing both sections.

In a last responsible employer case, when an employee has timely filed a claim against the latter of several employers, the time limitations of Sections 12 and 13 do not begin to run on a claim against a previous employer until the claimant is aware, or should be aware, that liability may be asserted against that employer. *See Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 524 (5th Cir. 1981). In *Smith*, the claimant worked as a sandblaster for multiple shipyards throughout his career. *Id.* at 520. After being diagnosed with silicosis, the claimant timely filed a claim against his last employer, but did not, at that time, file a claim against one of his a previous employers. *Id.* The court reasoned that, under the last responsible employer rule, no single employer may be held liable for a disability award until the next more recent employer is exculpated. *Id.* The court noted that "[i]f we held that section thirteen's one-year period begins to run on claims against all potentially liable employers when the employee learns that his affliction is occupationally derived, the employee would have to file against all past employers even though the last employer doctrine precludes liability for any but the last responsible employer." *Id.* The court concluded that "[a] claimant should not be time-barred on a claim against an employer . . . before [the employer] could be liable as a matter of law." *Id.* at 524.

The Board has extended the rationale in *Smith* to apply where a claim was timely filed against a prior employer and, subsequently, a later employer becomes liable. *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986). Additionally, the *Smith* rationale has been applied where a death benefits claim was timely filed against the United States Government, and then later amended once the claimant became aware of the identity of the decedent's last employer. *Shaller v. Cramp Shipbuilding and Dry Dock Co.*, 23 BRBS 140 (1989).

Under *Smith* and its progeny, the statute of limitations does not begin to run on the claim against CB Tech until it is possible for CB Tech to be liable as a matter of law. CB Tech cannot be liable until a determination is made that BW and BH were not liable. As BW and BH have been exculpated in this decision and Claimant notified CB Tech of his injury in May 2001, Claimant gave notice of his claim well before the company could have been held legally liable for Claimant's disability. Therefore, Claimant gave timely notice of his claim against CB Tech.

Section 13 – Time for Filing Claims

Smith and its progeny each involved a factual situation where an initial filing was timely made against one employer, following which a different employer became liable. CB Tech is therefore only liable for Claimant's disability if Claimant made an initial timely filing against

some employer. Claimant contends that his claim for the January 17, 2000 through April 14, 2000 injury was timely because it was filed within one year of the date that Claimant became aware of the injury. CB Tech asserts that the claim should have been filed within one year of the last day of Claimant's injury. Since Claimant's last day at CB Tech was April 14, 2000, CB Tech argues the claim for cumulative trauma was required to be filed by April 14, 2001.

Under Section 13, a claim for compensation is barred unless it is filed within one year of the date the claimant becomes aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. § 13(a). A claimant is not "aware" of the relationship between his injury and employment until he knows "the full character, extent and impact of the harm done to him." *Abel v. Director, OWCP*, 932 F.2d 819 (9th Cir. 1991). A claimant is aware of the full character, extent, and impact of his injury when he knows that the injury is work-related and knows or should know that the injury will impair his earning power. *Id.* at 821.

In *Paducah Marine Ways v. Thompson*, the claimant suffered four back injuries while working for his employer. *Paducah Marine Ways v.Thompson*, 82 F.3d 130, 132 (6th Cir. 1996). As a result of these injuries, he periodically missed work and required medical treatment. *Id.* However, he returned to work after each injury and worked for over three years after the last injury. *Id.* at 133. The claimant was then laid off for unrelated reasons and he began working for a non-longshore employer. *Id.* The claimant testified that his back hurt while he performed the non-longshore work. *Id.* Several months later, the claimant woke up in extreme pain one morning and was diagnosed with a herniated disc. *Id.* The claimant filed a claim for Longshore benefits, many years after his last work-related injury. *Id.* Adopting the "impairment standard," the Sixth Circuit held that the claim was nonetheless timely because the claimant had "no impairment of which he could be aware" until his disc problem surfaced and he was unable to work. *Id.* at 135.

As in *Paducah*, Claimant had no impairment of which he could be aware until the progression of his condition, caused by the cumulative trauma injury of 2000, became apparent. That progression was not apparent until diagnosed by a doctor. No doctor diagnosed the cumulative trauma injury until Dr. Hager's examination on February 9, 2002. Moreover, Claimant's inability to find work after leaving CB Tech did not put him on notice that his earning power had been impaired. That is, it was reasonable for Claimant to believe that, following his lay off, he was still capable of earning the wages which he received at CB Tech in the same or other employment. There was no reason for Claimant to equate his layoff with an impairment of his earning capacity because, according to CB Tech, Claimant was laid off due to lack of work, not due to his back condition. Claimant clearly believed himself to be capable of working in some capacity, as evidenced by his application for unemployment insurance, which requires an applicant to certify that he is capable of working. Nor would Claimant have understood the legal definition of disability: inability to return to one's prior employment. Here, Claimant was unable to return to his former employment because the job was not available. Even if available, it required him to work outside his medically imposed restrictions. Thus, Claimant was not aware of his impairment until February 9, 2002, when Dr. Hager diagnosed

Claimant's cumulative trauma injury.[22] Since the claim against CB Tech was filed on May 16, 2001, well before that diagnosis, I find the claim was timely filed.

Average Weekly Wage at CB Tech

Although the parties have stipulated to Claimant's average weekly wage at BH, at BW, and at Terminix, CB Tech and Claimant dispute Claimant's average weekly wage at CB Tech. Though the parties agree that Section 10(c) is the appropriate method of determining average weekly wage, they disagree about the number of weeks Claimant worked at CB Tech. Claimant asserts that he worked at CB Tech for a total of twelve weeks, basing this number on the payroll check history report submitted into evidence by CB Tech. CBX-E, p.9. Claimant then divides his total earnings, $8,572.25, by twelve and contends that his average weekly wage at CB Tech was $714.35. CB Tech argues that Claimant worked at CB Tech for thirteen weeks and one day, arriving at this number by counting the days between January 17, 2000, Claimant's first day of work, and Claimant's last day of work, April 14, 2000. Finally, dividing Claimant's total earnings, $8,572.25, by thirteen, CB Tech asserts that Claimant's average weekly wage at CB Tech was $659.40. I find that Claimant's average weekly wage was $714.19, based on twelve weeks of work at CB Tech.

Section 10 of the Act provides for three methods determining the appropriate average weekly wage of an injured worker. These methods are set forth in Sections 10(a), 10(b), and 10(c). That figure is then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910. The computation methods establish a claimant's earning capacity at the time of injury. *See Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies when an injured employee worked in the employment in which he was working at the time of the injury, whether for the same or another employer, for substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Section 10(b) applies when the injured worker was not employed the whole of the year immediately preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When Section 10(a) or 10(b) "cannot reasonably and fairly be applied," Section 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). Section 10(c) does not prescribe a fixed formula but requires the judge to establish a figure that "shall reasonably represent the annual earning capacity" of the claimant. 33 U.S.C. § 901(c); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998).

I agree with the parties that Section 10(c) applies in this case. I find that Claimant's average weekly wage was $714.19, based on twelve weeks of work at CB Tech. The payroll

[22] Although Claimant filed a claim for cumulative trauma prior to the date of his diagnosis, the filing does not constitute evidence of awareness for the purposes of Sections 12 and 13. The filing is more properly viewed as a protective filing, made by Claimant's counsel, prior to obtaining a medical confirmation of the fact of injury.

check history report submitted by CB Tech and relied on by Claimant indicates that Claimant received a total of twelve weekly paychecks from January 28, 2000 to April 21, 2000. Thus, even if Claimant began and ended work on the dates CB Tech alleges, a period of thirteen weeks, the report suggests that Claimant actually worked for only twelve of those thirteen weeks.[23] Since neither party disputes the authenticity of the payroll report, I conclude that Claimant worked at CB Tech for a total of twelve, not thirteen weeks.

Using the information contained in the payroll record, I have calculated Claimant's average weekly wage as follows: Claimant worked 454 regular hours and 33.5 hours of overtime, for a total of 487.5 hours worked. Dividing Claimant's total earnings, $8,572.25, by the total number of hours worked, 487.5, I find that Claimant's average hourly wage is $17.58. I further find that Claimant worked an average of 40.625 hours per week by dividing the total number of hours worked by twelve, the total number of weeks worked. Finally, multiplying Claimant's average hours per week, 40.625, by Claimant's average hourly wage, $17.58, I conclude that Claimant's average weekly wage at CB Tech was $714.19.

Nature and Extent of Disability

Claimant asserts that he was permanently totally disabled beginning April 15, 2000 through March 11, 2001, that he was permanently partially disabled beginning March 12, 2001 through June 24, 2002, and that he has been temporarily totally disabled following June 24, 2002. CB Tech does not address the extent or nature of Claimant's disability from April 15, 2000 through March 11, 2001, nor the nature and extent of Claimant's disability following June 24, 2002. As to Claimant's disability from March 12, 2001 through June 24, 2002, CB Tech contends that Claimant was not disabled because he did not suffer an economic loss.

The burden of proving disability rests with the claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Disability requires a causal connection between a worker's physical injury and his inability to obtain work. If the claimant shows he cannot return to his prior job, it is the employer's burden to show that suitable alternate employment exists which he can perform. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

[23] Although Claimant failed to bring this to my attention, by scrutinizing the evidence I have concluded that Claimant did not work from March 17, 2000 through March 22, 2000 for medical reasons. CBX-E, p. 9, 24, 25. Thus, Claimant received twelve, rather than thirteen weekly paychecks during his employment with CB Tech. Because Claimant's absence was for medical reasons, I will not count this week in the calculation of his average weekly wage under Section 10(c).

Nature of Claimant's Disability from April 15, 2000 through June 24, 2002

Claimant asserts that, beginning April 15, 2000 and continuing through June 24, 2002, he was permanently disabled.[24] However, I find that Claimant's disability during most of this period was not permanent, as Claimant asserts, but rather temporary.

A disability becomes permanent when the claimant reaches maximum medical improvement (MMI). *Trask*, 17 BRBS at 60. The date of maximum medical improvement is a question of fact based on medical evidence. *Id.* Here, the medical evidence does not support a finding that Claimant was continuously permanently disabled from April 14, 2000 through June 24, 2002. Although Dr. Hager opined that Claimant's condition reached MMI on November 18, 1999, Claimant subsequently suffered a cumulative trauma injury at CB Tech, from January 17, 2000 through April 14, 2000. Because Claimant's condition worsened as a result of this new injury, he was no longer at maximum medical improvement. While Dr. Hannon's reports of May 30, 2000, July 28, 2000, and May 17, 2000, and Dr. Smith's report of May 30, 2001 all note that Claimant was MMI, neither doctor was aware that Claimant had sustained a cumulative trauma injury at CB Tech. Thus, their determinations regarding Claimant's condition, including their determination of his MMI status, were based on incomplete information.

Claimant's cumulative trauma injury was first diagnosed by Dr. Hager on February 9, 2002. In his report of that examination, Dr. Hager also concluded that Claimant had reached MMI. Because Dr. Hager considered Claimant's cumulative trauma injury in reaching this conclusion, I accept his opinion regarding MMI. Since Dr. Hager's report does not indicate the exact date on which Claimant reached MMI, I find that Claimant reached MMI as of the date of the examination, February 9, 2002. Thus, his disability became permanent at that time and remained permanent until his collapse on June 24, 2002.

Extent of Disability Beginning April 15, 2000 and continuing through March 11, 2001

Claimant argues that he was totally disabled following his last day at CB Tech, April 14, 2000, and continuing until his employment at Terminix on March 12, 2001. Although Claimant was laid off from his job at CB Tech due to lack of work, he contends that the lay-off coincided with his need to find suitable alternative employment because of his disability. CB Tech proffers no argument regarding Claimant's alleged period of total disability following April 14, 2000 and continuing through March 11, 2002.

I find that Claimant was totally disabled following April 14, 2000 and continuing through March 11, 2001. Claimant testified that, although he actively sought employment following his lay-off from CB Tech, he had difficulty finding a job because of his restrictions. CB Tech offers no evidence to rebut this assertion. Therefore, it is undisputed that Claimant's failure to find employment was due to the work restrictions imposed on him because of his disability. Accordingly, I find that Claimant was temporarily totally disabled from April 15, 2000 and

[24] In his post-hearing brief, Claimant asserts that he was permanently totally disabled from April 15, 2000 through March 11, 2001. Claimant does not specify the nature or extent of disability from March 12, 2001 through June 24, 2002, but merely contends that he suffered a wage loss. I presume that Claimant alleges he was permanently partially disabled during this period.

continuing through March 11, 2002. Claimant is entitled to compensation in the amount of $476.13.[25]

Extent of Claimant's Disability from March 12, 2001 through June 24, 2002

Claimant asserts that he was permanently partially disabled from the first day of his employment with Terminix on March 12, 2001 until his collapse on June 24, 2002.[26] Claimant argues that his average weekly wage at CB Tech ($714.35 according to Claimant's calculations), was higher than his average weekly wage at Terminix ($701.89) and that he therefore sustained a loss of wage earning capacity. CB Tech urges that Claimant sustained no permanent partial disability for the period of March 12, 2001 through June 24, 2002. Contending that Claimant's average weekly wage at CB Tech was $659.40, CB Tech argues that Claimant earned more while working at Terminix, where his average weekly wage was $701.89. Thus, CB Tech concludes that Claimant did not sustain an economic loss from March 12, 2001 through June 24, 2002 and that he was therefore not disabled.

I have already concluded that Claimant's average weekly wage at CB Tech was $714.19, not $659.40 as CB Tech alleges. Given that Claimant's average weekly wage at Terminix, $701.89, was lower than his average weekly wage at CB Tech, I find that Claimant was temporarily partially disabled beginning March 12, 2001 and continuing through June 24, 2002 and Claimant is entitled to compensation in the amount of $8.20 per week[27] for that period.

Extent of Claimant's Disability following June 24, 2002

Relying on the opinion of Dr. Hager, Claimant asserts that he has been temporarily totally disabled following his June 24, 2002 collapse. Dr. Hager testified that Claimant should be limited to sedentary work activities and CB Tech does not dispute this finding. Since Claimant's employment at Terminix was not sedentary, Claimant cannot return to that job. CB Tech presents no evidence to show that suitable alternative employment exists. I therefore find that Claimant has been temporarily totally disabled since June 24, 2002 and is entitled to compensation at a rate of $476.13.[28]

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[25] This figure is derived by calculating two-thirds of $714.19, Claimant's average weekly wage at CB Tech. 33 U.S.C. § 908(b).

[26] Claimant does not specify whether he was permanently or temporarily disabled during this period. Since Claimant asserts his disability was permanent prior to March 12, 2001 and does not assert any change from March 12, 2001 through June 23, 2002, I will assume Claimant's contention is that he was permanently partially disabled while at Terminix.

[27] The figure represents two-thirds of the difference between Claimant's average weekly wage at CB Tech, $714.19, and his average weekly wage at Terminix, $701.89 ($714.19 - $701.89 = 12.30; 2/3 x 12.30 = $8.20). 33 U.S.C. § 908(e).

[28] This figure is derived by calculating two-thirds of $714.19, Claimant's average weekly wage at CB Tech. 33 U.S.C. § 908(b).

Section 7 – Claimant's entitlement to Medical Treatment

Section 7(a) of the Act, 33 U.S.C. § 907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." Under Section 7, an employer is required to furnish the injured employee with medical care that is reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The parties offer no specific arguments regarding Claimant's entitlement to medical care under Section 7. Because I find that Claimant's cumulative trauma injury at CB Tech aggravated his pre-existing low-back condition, I find that CB Tech is liable for Claimant's related medical treatment following April 14, 2000.

Section 8(f) – Special Fund Relief

CB Tech contends that it is entitled to Section 8(f) relief, asserting that Claimant's condition is permanent and that he reached maximum medical improvement on March 13, 2001. The Director argues that there is no medical evidence to support the position that maximum medical improvement was reached on that date.[29]

Under Section 8(f), an employer may limit its liability for payment of permanent disability to 104 weeks compensation. 33 U.S.C. § 908(f). An employer is eligible for Section 8(f) relief when a work-related injury combines with a pre-existing partial disability, resulting in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Section 8(f) relief is only available for permanent disability. *Jenkins v. Kaiser Aluminum & Chem. Sales*, 17 BRBS 183, 187 (1985).

After reviewing the record, I agree with the Director that there is no medical evidence to support CB Tech's contention that Claimant reached maximum medical improvement on March 13, 2001. As discussed above, I find that Claimant reached MMI on February 9, 2002. Claimant's condition was permanent from that date until June 24, 2002. Because he was permanent during this time period, approximately nineteen weeks, Claimant was potentially eligible for Section 8(f) relief. However, under Section 8(f), an employer must provide compensation for the first 104 weeks of a claimant's permanent disability. Thus, even if CB Tech was eligible for Section 8(f) relief from February 9, 2002 through June 24, 2002, CB Tech would still be responsible for Claimant's compensation during that time. In short, a determination favorable to CB Tech would not result in relief being granted. I therefore decline to decide at this time whether CB Tech is entitled to Section 8(f) relief.

CONCLUSION

As a result of his work at CB Tech from January 17, 2000 through April 14, 2000, Claimant sustained a cumulative trauma injury ("the 2000 injury") which aggravated his pre-

[29] The Director raises other issues that are not ripe for review, as discussed *infra*. However, the Director's argument appears to conflate the dates and circumstances of Claimant's injuries. As a consequence, the argument is impossible to follow.

existing condition. Because Claimant did not sustain any subsequent aggravating injury, CB Tech is the last responsible employer and is liable for Claimant's compensation and medical benefits beginning April 15, 2000. In accordance with Sections 12 and 13, Claimant timely noticed and filed his claim for the 2000 injury. Claimant's average weekly wage at CB Tech was $714.19. Claimant was temporarily totally disabled following April 14, 2000 and continuing through March 11, 2001. Claimant was temporarily partially disabled beginning March 12, 2001 and continuing through February 9, 2002. Claimant was permanently partially disabled from February 10, 2002 through June 24, 2002. Claimant has been temporarily totally disabled since June 25, 2002.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and based upon the entire record, I issue the following order:

1. CB Tech shall pay Claimant temporary total disability at the compensation rate of $476.13 per week beginning April 15, 2000 and continuing through March 11, 2001. CB Tech shall pay Claimant temporary partial disability at the compensation rate of $8.20 per week beginning March 12, 2001 and continuing through February 9, 2002. CB Tech shall pay Claimant permanent partial disability at the compensation rate of $8.20 per week beginning February 10, 2002 and continuing through June 24, 2002. CB Tech shall pay temporary total disability at the compensation rate of $476.13 per week beginning June 25, 2002.

2. CB Tech shall pay interest on each unpaid installment of compensation from the date the compensation became due. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date this decision and order is filed with the District Director. See 28 U.S.C. 1961.

3. CB Tech shall pay Claimant's Section 7 benefits beginning April 15, 2000.

4. CB Tech is entitled to a credit for compensation already paid, if any.

5. All computations are subject to verification by the District Director who in addition shall make all calculations necessary to carry out this order.

6. Counsel for Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for CB Tech within 21 days of the date this Decision and Order is served. Counsel for CB Tech shall provide the undersigned and Claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for Claimant shall initiate a verbal discussion with counsel for Employer in an effort to amicably resolve as many of

CB Tech's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of CB Tech's Statement of Objections, Claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for CB Tech, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for CB Tech no later than 30 days after service of CB Tech's Statement of Objections. Within 14 days after service of the Final Application, CB Tech shall file a Statement of Final Objections and serve a copy on counsel for Claimant. No further pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

7. The parties will immediately notify this office upon filing an appeal, if any.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge